No. 1323

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff in Error,

vs.

J. A. MOORE, *Defendant in Error.*

Petition of Plaintiff in Error for Re-hearing in Part, Modification of Opinion and for Final Judgment.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

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To the Honorable, the Judges of the above entitled Court:

The plaintiff in error respectfully petitions the Court to modify its opinion filed herein, on the first day of October, 1906, by directing the trial court to sustain the motion of the plaintiff in error for judgment, notwithstanding the verdict, and to enter judgment for the plaintiff in error for the full amount claimed in its complaint, and

for attorneys' fees and costs, upon the following grounds and for the following reasons:

I.

Counsel for plaintiff in error will endeavor to very briefly point out the state of the record, and the grounds upon which they ask this Court to finally end this litigation. At the close of the evidence counsel moved the trial court to direct the jury to find for the plaintiff in error, and in the opinion filed this Court holds that the evidence on the part of the defendant was insufficient to take the case to the jury, and that the motion should have been granted, and the peremptory instruction given.

Our 16th assignment of error, found on page 178 of the record, is predicated upon the refusal of the trial court to grant our motion for judgment notwithstanding the verdict. The motion itself is found at pages 27 and 28 of the record, and the order denying the motion is found at pages 31 and 32 of the record. The record, on pages 159 and 160, shows that the plaintiff in error seasonably saved its exceptions to the action of the court.

In our brief, pages 26, 27 and 40, we discussed this question and will not here repeat our discussion, and will content ourselves with a single proposition, viz.: The right of a plaintiff in the Circuit Court of the United States to have a judgment notwithstanding an adverse verdict.

We think it must be admitted that we have properly saved our exceptions, and that if, under the practice of the State of Washington, we are entitled to a judgment notwithstanding the adverse verdict, we should have it in this case. This Court, in *United States vs. Gardner,* 133 Federal, page 285, says, at page 288, after discussing the entry of judgment *non obstante veredicto* at common

law, and announcing the principle that it could only be granted upon the application of the plaintiff, and upon a plea to the declaration, which confessed the cause of action and set up matters in avoidance, which, upon their face, were insufficient to constitute a defense or a bar, goes on to say:

"The rule has been relaxed in most of the states so far as to permit a judgment on the pleadings, notwithstanding the verdict in behalf of either the plaintiff or the defendant. We find no statute of Washington or decision of the Supreme Court of the State of Washington further relaxing the rule so far as to permit the consideration of evidence in the case."

This Court was wholly correct in that holding as the law of the State then stood. Since that decision, however, and on the 2nd day of February of the present year, the Supreme Court of the State of Washington, in the case of *Roe vs. The Standard Furniture Company* (not yet reported), discussed this identical question. That was an action for personal injuries, and after all the evidence was in the defendant challenged the evidence and moved for a directed verdict. The Court denied the motion and submitted the case to the jury, who rendered a verdict for the plaintiff, and defendant moved for a new trial and separately moved for judgment, notwithstanding the verdict upon the same grounds as those upon which it had asked for a directed verdict. The trial court granted the motion for judgment, notwithstanding the verdict.

Upon appeal by plaintiff, the Court says:

In support of his position appellant cites numerous authorities, including 11 Ency. Plead. & Prac., 917-921, on which he places special reliance, and further insists that no section of our code provides for a judgment *non ob-*

stante veredicto, after a cause has been submitted to a jury and their verdict has been returned; that after verdict a defendant's only remedy is by motion for a new trial, and that the jury being the exclusive judges of the facts, when the evidence has once been submitted to them, the court can only grant a rehearing.

There is no doubt but that the early common law rule as stated by appellant is historically correct, but the practice in this state has been modified, and such modification is warranted by certain provisions of our code hereinafter mentioned. If the rule of practice contended for by appellant as pertinent to a motion for judgment *non obstante veredicto* be approved, then no available method would exist by which a trial court could correct its own mistake in erroneously submitting a case to the jury, other than that of granting a motion for a new trial, and such new trial would have to be granted, even though it was indisputably apparent that a plaintiff had no possible right of recovery. Bal Code, § 6521, provides:

"Upon an appeal from a judgment or order . . . the supreme court may affirm, reverse or modify any such judgment or order appealed from, as to any or all the parties, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had . . ."

Assuming that the trial court erred in denying respondent's motion for a directed verdict, if it had thereafter entered final judgment upon the verdict returned, this court upon an appeal based on proper assignments of error, would not only order a reversal, but would also direct a final judgment dismissing the action. This being true, the trial court should be permitted to make the order without the necessity of an appeal. Bal. Code, § 5056, after providing that this court on appeal may review orders, rulings, or decisions to

which no exceptions need be taken, and also those to which proper exceptions have been taken, contains the following language:

"And any such alleged error shall also be considered in the court wherein or by a judge where of the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment, notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion."

This court has repeatedly reviewed decisions of trial courts refusing to direct verdicts, and we are of the opinion that it is the proper practice for a trial court, upon the hearing of a motion for judgment *non obstante veredicto,* to enter final judgment in favor of either party where it is warranted by the undisputed evidence. The facts being undisputed, it becomes the duty of the court to apply the law, there being no issue to submit to a jury. While the above rule of practice may not have been heretofore expressly announced by us, we have nevertheless in a number of cases put it into practical effect and recognized the principle above enunciated. *Larson v. American Bridge Co.,* 1 Wash. Dec. 438, 82 Pac. 294; *Dyer v. Middle Kittitas Irr. Dist.,* 1 Wash. Dec. 449, 28 Pac. 301; *Bancroft v. Godwin,* 2 Wash. Dec. 332, 82 Pac. —.

In *Larson v. American Bridge Co., supra,* the defendant challenged the sufficiency of the evidence, and moved for a dismissal of the action. This challenge being denied, a general verdict was returned in favor of the plaintiff, and special interrogatories submitted at the request of the defendant on the question of independent contractor were answered against the defendant's contention. A new trial being granted, the plaintiff appealed. This court having found that neither the general

verdict nor the answers to the special interrogatories were supported by the evidence, speaking through Hadley, J., said:

"When ruling upon the motion for new trial, the court stated that, as there was no competent evidence whatever to sustain the findings, they would be set aside. The court was then convinced that it had misapprehended the evidence at the time respondent interposed its challenge thereto. Such was clearing the case, and it was not error to set aside the findings and also the general verdict. Respondent asks, inasmuch as the evidence shows no cause of action against it, that the cause shall be remanded with instructions to dismiss the action. We think this request should be granted. Respondent was entitled at the trial to have its challenge to the evidence sustained, and it is still entitled to it. *Bernhard v. Reeves,* 6 Wash. 424, Pac. 873."

In *Dyer v. Middle Kittitas Irr. Dist.,* on a jury trial, the plaintiff moved the trial court to discharge the jury, and render judgment in his favor, which motion being denied, a verdict was returned in favor of defendant. The plaintiff immediately moved for a new trial, and for judgment notwithstanding the verdict. Before the motions were passed upon, the motion for a new trial was withdrawn and the plaintiff's rights were submitted upon the motion for judgment, which the trial court denied, entering the judgment upon the verdict. On appeal this court reversed the judgment of the trial court, and remanded the cause with directions to enter judgment for plaintiff for the amount due.

Was respondent entitled to a directed verdict and judgment of dismissal at the time defendant interposed its challenge to the sufficiency of the evidence? Without passing upon the defenses of fellow servant or assumption of risk, we think the final judgment was justified for the reason that appellant's evidence shows the accident to have been the direct result of his own negligence. Madison Street, wide and well paved, running east and west, is intersected by Boylston and Broadway, parallel

streets, running north and south one block apart, Broadway being east of Boylston. According to appellant's own evidence, he drove north on to Madison street from Boylston avenue, and proceeded east on the south side of Madison, traveling at a moderate gait, with his horse under full control. About the same time, Hi Glass, coming south on Broadway at a moderate gait, turned into Madison towards the west. Having a heavy piece of furniture to deliver at a house on the south side of Madison, a short distance from Broadway, he, Glass, drove directly across Madison and was in the act of backing his van up to the curb when the collision occurred. Without detailing the evidence, we find that appellant, without reason or excuse, attempted to drive between the large van and the curb, when as a careful driver he should have known he could not do so, and at a time when he, having full control of his horse, could either have halted or have driven out upon the street and passed in front of Glass's team and van, there being no obstructions anywhere in the street. The accident occurred late in the afternoon, when appellant was making his last delivery, and he simply appears to have taken unnecessary chances in order that he might proceed more quickly to the completion of his day's labor. We fail to find any evidence showing negligence on the part of Glass. As said in *Larson v. American Bridge Co., supra,* respondent was entitled at the trial to have its challenge to the evidence sustained, and is still entitled to it. The trial court committed no error in sustaining respondent's motion *non obstante verdicto.*

The judgment is affirmed.

Mount, C. J., Root, Rudkin, Dunbar, Fullerton and Hadley, JJ., concur.

This case, we respectfully submit, makes clear that our motion for judgment, notwithstanding the verdict, should be granted, and the opinion should be so modified as to

direct the trial court to enter a judgment in favor of the plaintiff in error for the relief demanded in its complaint.

The case has been tried twice and has been twice in this court. The evidence is all before the Court, and we submit that as the defendant in error failed to produce any evidence sufficient to take the case to the jury, the litigation should end, and the plaintiff be given the judgment to which it is entitled.

Respectfully submitted,

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